No. 87-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspection, and ROBERT J. LURCOTT, Director of the Pittsburgh Department of City Planning,
Petitioners,

v.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and JOHN KING, on their own behalf and on behalf of all others similarly situated, and ALCOHOLIC RECOVERY CENTER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONERS' REPLY BRIEF

D. R. PELLEGRINI *
City Solicitor

KELLEN MCCLENDON
Assistant City Solicitor
City of Pittsburgh
Department of Law
313 City-County Building
Pittsburgh, PA 15219
(412) 255-2010

* Counsel of Record for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-83

THE CITY OF PITTSBURGH, PENNSYLVANIA, PAUL J. IMHOFF, Superintendent of the Pittsburgh Bureau of Building Inspection, and ROBERT J. LURCOTT, Director of the Pittsburgh Department of City Planning,

Petitioners,

v.

DENNIS SULLIVAN, MICHAEL DISKIN, JAMES ROSEWEIR, HERSHEL HEILIG, WAYNE JACKSON, JOHN CLARK and JOHN KING, on their own behalf and on behalf of all others similarly situated, and ALCOHOLIC RECOVERY CENTER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

The City's Petition for a Writ of Certiorari presented this court with an important issue relating to the nature of federalism—whether state and local administrative agency decisions subject to state court review can give rise to Section 1983 violations.[1] Class-action plaintiffs' opposing brief at No. 87-83 both misinterprets the issue

[1] Despite class-action plaintiffs' claim to the contrary, the Third Circuit, in fact, reached this issue at A-27, n.14. Class-action plaintiffs contend that this Court should not hear this case because the district court decision was affirmed on the basis that the City violated the Rehabilitation Act of 1973. The City is prepared to defend that portion of the case before a jury in the hearing on the permanent injunction.

as well as obfuscates it by contending that there is no conflict between the Circuits.

Class-action plaintiffs' analysis is one directed at where the actions complained of are legislative in character and not, as here, where the action complained of is that of an administrative agency decision subject to state court review.[2] This Petition raises the issue as to whether federal courts will become "super administrative agencies" and not allow the state judiciary to correct any errors committed by state and local agencies.

By applying their analysis that studiously avoids addressing the issue raised by the City, class-action plaintiffs claim that no conflicts exist between the Circuits as to whether administrative agency decisions subject to state court review can give rise to a federal claim. In *Littlefield v. City of Afton*, 785 F.2d 596 at 603-605 (8th Cir. 1986), a case cited by class-action plaintiffs, and in accord with the Third Circuit's decision, the Eighth Court discusses in detail the conflict that exists between the Circuits. The Third Circuit in *Cohen v. City of Philadelphia*, 736 F.2d 81, *cert. denied*, 469 U.S. 1019, 105 S.Ct. 6341, a decision apparently overruled by that Circuit's decision in this case, stated (p. 86):

> We thus join the *First and Seventh Circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary.* Any other holding would lead to the danger that: any plaintiff in state court who was asserting a right within the broadly defined

---

[2] *City of Cleburne v. Cleburne Living Center*, —— U.S. ——, 105 S.Ct. 3249 (1985) is not applicable for reasons set forth on pp. 4-5 of the City's Petition. A review of the main and amicus briefs filed by the parties in *Cleburne* shows that the issue being raised in the instant matter was not before this Court in that case. The Texas and Fifth Circuit cases cited by the City show that denials of special-use permits under Texas law are considered legislative in nature and not subject to judicial review, unlike Pennsylvania law where they are administrative in nature and subject to judicial review as to the propriety of the decision.

> categories of liberty or property and who lost his case because the Judge made an error could attack the judgment indirectly by suing the judge under Section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. . . . (Emphasis added).[3]

By not following *Cohen* and holding that an administrative agency denial of a zoning application does create a federal claim, the Third Circuit places itself at variance with decisions in the First, Second and Seventh Circuits and in accord with the Fifth and Eighth Circuits.

The decisions of the various Circuits show a conflict between them as to whether administrative agency decisions can give rise to Section 1983 violations and a reading of their opinions shows as well the extreme difficulty they are having in addressing this issue.

Other arguments raised by class-action plaintiffs are dealt with in the City's Petition.

Respectfully submitted,

D. R. PELLEGRINI *
City Solicitor

KELLEN MCCLENDON
Assistant City Solicitor
City of Pittsburgh
Department of Law
313 City-County Building
Pittsburgh, PA 15219
(412) 255-2010

* Counsel of Record for Petitioners

---

[3] The First and Seventh Circuit decisions relied upon are *Roy v. City of Augusta*, 712 F.2d 1517, 1524 (1st Cir. 1983); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982); and *Albery v. Reddig*, 718 F.2d 245, 249 n.7 (7th Cir. 1983).